IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1978

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NO. ~~77-1058~~ 8

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RAYMOND A. HELGEMOE, WARDEN,
NEW HAMPSHIRE STATE PRISON, ET AL.,
Petitioners

V.

THOMAS E. MELOON,
Respondent

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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

The Petitioners, Raymond A. Helgemoe, Warden, New Hampshire State Prison, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding



on October 31, 1977.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the First Circuit is reported at 564 F.2d 602 (1st Cir. 1977) and a copy of that Opinion is appended hereto as Appendix A. The Opinion of the District Court, which granted Respondent's Petition for Writ of Habeas Corpus and was affirmed by the First Circuit, is not reported; a copy of that Opinion is appended hereto as Appendix B. The Opinion of the New Hampshire Supreme Court which upheld Respondent's conviction is reported as State v. Meloon, 116 N.H. 669, 366 A.2d 1176 (1976). A copy of the Opinion is appended hereto as Appendix C.

## JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on October 31, 1977, and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254 (1).



## QUESTION PRESENTED

I. WHETHER NEW HAMPSHIRE REVISED STATUTES ANNOTATED 632:1, I-c, WHICH MAKES IT UNLAWFUL FOR A MALE TO HAVE SEXUAL INTERCOURSE WITH A FEMALE NOT HIS WIFE WHO IS LESS THAN FIFTEEN YEARS OLD, OFFENDS THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

## STATUTORY PROVISION INVOLVED

New Hampshire RSA 632:1 states in pertinent part:

> "632:1 Rape.
> I. A male who has sexual intercourse with a female not his wife is guilty of a class A felony if . . .
> (c) the female is unconscious or less than fifteen years old . . . ."



## STATEMENT OF THE CASE

This petition for a writ of certiorari arises from the First Circuit's affirmance of an Opinion by the United States District Court for the District of New Hampshire granting Respondent's petition for writ of habeas corpus pursuant to 28 U.S.C. §§ 2241 and 2254. The Opinions of both the Circuit Court and the District Court held that New Hampshire's statutory rape law (RSA 632:1, I-c), under which Respondent was convicted, violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

The Respondent, Thomas E. Meloon, and the proseeutrix, Susan D. Souriolle, first met in Portsmouth, New Hampshire during late August or early September of 1973. At the time of this meeting, the prosecutrix

was thirteen years of age; the Respondent was twenty-four. On three separate occasions thereafter, the Respondent and the prosecutrix engaged in consensual sexual intercourse. Respondent was then arrested, charged, indicted, and on May 21, 1974, convicted of statutory rape pursuant to New Hampshire RSA 632:1, I-c. (This statute was repealed and replaced on August 6, 1975, with RSA 632-A, a gender neutral law.)

Respondent's conviction was upheld on direct appeal to the New Hampshire Supreme Court, which considered and explicitly rejected Respondent's equal protection claims. See Appendix C. However, the United States District Court for the District of New Hampshire subsequently granted Respondent a writ of habeas corpus on the ground that New Hampshire's statutory rape



law, RSA 632:1, I-c, violated the Equal Protection Clause of the Fourteenth Amendment. See Appendix B.

The judgment of the District Court was affirmed by the United States Court of Appeals for the First Circuit on October 31, 1977. See Appendix A.

## REASONS FOR GRANTING THE WRIT

### I. IN HOLDING THAT NEW HAMPSHIRE'S STATUTORY RAPE LAW, RSA 632:1, I-c, VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT, THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT HAS DECIDED A SUBSTANTIAL QUESTION OF CONSTITUTIONAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The law under which the Respondent was convicted, RSA 632:1, I-c, made it unlawful for any male to have sexual intercourse with a female not his wife who was less than fifteen years old. The District Court, in striking down this statute, became the first court in the nation to hold any statutory rape law unconstitutional on equal protection grounds. The Court of Appeals then affirmed. Petitioners respectfully submit that the decisions of the District Court and the Court of Appeals are erroneous.



These decisions present this Court with the unique opportunity not only to address the first impression issue of the constitutionality of a gender based statutory rape law vis-a-vis the Equal Protection Clause, but also to reanalyze and clarify the unsettled question of what is the correct equal protection test to apply to statutory classifications based on sex.

Few areas of the law have troubled this Court as much in recent years as has the problem of testing statutory classifications based on sex against the Equal Protection Clause of the Fourteenth Amendment. There are, of course, two traditional tests to which constitutionally challenged statutes under the Equal Protection Clause have been subjected -- rational basis and strict scrutiny. Under the rational basis

standard a state is entitled to make reasonable classifications among persons upon whom benefits are conferred or burdens imposed, and the equal protection safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective. See, e.g., Dandridge v. Williams, 397 U.S. 471, 484-485 (1970); McGowan v. Maryland, 366 U.S. 420, 425-426 (1961); and Williamson v. Lee Optical Co., 348 U.S. 483, 488-489 (1955).

The strict scrutiny test is imposed if the statutory distinction is based upon a "suspect classification" such as race, alienage, or nationality, (Loving v. Virginia, 388 U.S. 1 (1967); Graham v. Richardson, 403 U.S. 365 (1971); and Oyama v. California, 332 U.S. 633 (1948)) or if the distinction infringes a "fundamental



interest." Dunn v. Blumstein, 405 U.S. 330 (1972); and Skinner v. Oklahoma, 316 U.S. 535 (1942). To successfully withstand the strict scrutiny test, a state must demonstrate a "compelling state interest" in creating the challenged classifications. Skinner v. Oklahoma, supra.

Where the statutory classification under consideration has been based on sex, however, this Court has been unwilling to apply either of the traditional tests. Instead, the Court has resorted to an amorphous "substantial relation" test which requires more heightened scrutiny than would be applied under the rational basis standard, but less stringent scrutiny than is applied to suspect legislation.

This middle-tier approach began to evolve in Reed v. Reed, 404 U.S. 71

(1971). The Court, in striking down a probate statute which gave males a preferred position as executors, stated:

> "A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'" Reed v. Reed, supra, at 76. (citation omitted)

The rationale of the Reed decision provided the underpinning for subsequent holdings which invalidated statutes employing gender as an inaccurate proxy for more germane bases of classification and which rejected administrative ease and convenience as sufficiently important objectives to justify gender-based distinctions. See, Stanton v. Stanton, 421 U.S. 7 (1975); Weinberger v. Wisenfeld, 420 U.S.



636 (1975); Taylor v. Louisiana, 419 U.S. 522 (1975); and Stanley v. Illinois, 405 U.S. 645 (1972). In other cases the Court, applying in some instances the traditional rational basis test and in others the substantial relation test of Reed, found that certain classifications challenged as sexually discriminatory were in fact based on functional or circumstantial differences between the sexes; therefore no violation of the Equal Protection Clause existed. See, General Electric Co. v. Gilbert, ___ U.S. ___, 97 S. Ct. 401 (1976); Schlesinger v. Ballard, 419 U.S. 498 (1975); Geduldig v. Aiello, 417 U.S. 484 (1974); and Kahn v. Shevin, 416 U.S. 351 (1974).

In Frontiero v. Richardson, 411 U.S. 677 (1973), four Justices went so far as to conclude that sex should be regarded as

a suspect classification. Since Frontiero, however, the Court has not only declined to hold that sex is a suspect class, but it has significantly retreated from that position. See, Califano v. Goldfarb, ____ U.S. ____, 97 S. Ct. 1021 (1977); General Electric Co. v. Gilbert, supra; Craig v. Boren, 429 U.S. 190 (1976); and Mathews v. Lucas, 427 U.S. 495 (1976).

The most relevant precedent for the instant case is Craig v. Boren, supra, the only Supreme Court gender-based discrimination case concerning a criminal statute. In Craig, the Court examined and struck down an Oklahoma statute which prohibited the sale of 3.2% beer to males under the age of 21 and females under the age of 18. The majority applied the substantial relation test from Reed, but three Justices



expressed outward concern with this standard. Justice Powell, in a concurring opinion, indicated that the rational basis test should take on a "sharper focus" when addressing a gender-based classification, but he balked at characterizing the new test as an independent "middle-tier" approach. Craig v. Boren, 429 U.S. 190, S. Ct. 451, 464 (1976). In separate dissenting opinions, both Chief Justice Burger and Justice Rehnquist expressed their position that gender based cases, like all cases where no suspect classification or fundamental interest is involved, should be tested by the traditional rational basis standard. Craig v. Boren, supra, at 466, 467, 469. Justice Rehnquist went on to express his concern that the substantial relation test is "so diaphanous and elastic

as to invite subjective judicial preferences or prejudices relating to particular types of legislation . . . ." Craig v. Boren, supra, at 467, 468.

In the instant case the Court of Appeals was troubled by the amoebic quality of the substantial relation test. Chief Judge Coffin comments that it is "hardly a precise standard," and he worries that "we must decide the constitutionality of the New Hampshire statute under a test that to some indeterminate extent requires more of a connection between classification and governmental objective than that of the minimal rationality standard." Meloon v. Helgemoe, supra, at 604.

Despite the First Circuit's misgivings over the imprecision of the Reed substantial relation test, the Court found that the New



Hampshire statute could not pass muster under that test. This decision is made even more suspect by the First Circuit's suggestion that the Court would not have struck down the statute under the "minimal rationality test." Meloon v. Helgemoe, supra, at 606.

In sum, this Court has created a new equal protection test which resides somewhere in the "twilight zone" between the rationale basis and strict scrutiny tests. This new standard lacks definition, shape, or precise limits. The instant case is a perfect example of what Justice Rehnquist feared most - the abuse of a standard so "diaphanous and elastic" as to permit subjective judicial preferences and prejudices concerning particular

legislation. The instant case represents an opportunity for the Court to define, shape, limit, or even eliminate the new standard. In all events, it presents the opportunity for the Court to correct a situation which invites subjective judicial judgments and possible abuses.

Finally, as noted above, the instant case is one of first impression. Never has this Court weighed a gender-based statutory rape law against an equal protection argument. The implications of the First Circuit's Decision for all gender-based criminal statutes and for equal protection analysis in general are devastating. The decision should not be left to the Court of Appeals. The issue is substantial and worthy of this Court's



consideration.

## II. THE HOLDING OF THE COURT OF APPEALS IS IN DIRECT CONFLICT WITH A DECISION OF THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE AND WITH THE DECISIONS OF ALL OTHER STATE COURTS WHICH HAVE CONSIDERED THE QUESTION.

During the course of Respondent's direct appeal to the New Hampshire Supreme Court, he first raised the issue of whether RSA 632:1,I-c was violative of the Equal Protection Clause. The Court considered Respondent's argument and in a unanimous decision explicitly rejected it. State v. Meloon, supra, at 670, 671.

The New Hampshire Supreme Court does not stand alone. On the contrary, equal protection attacks against statutory rape laws have been universally rejected by every state court considering the question.

See, e.g., People v. Mackey, 46 Cal. App. 755, 120 Cal. Rptr. 157 (1975); People v. Green, 183 Colo. 25, 514 P.2d 769 (1973); In re W.E.P., 318 A.2d 286 (D.C. App. 1974); State v. Drake, 219 N.W. 2d 492 (Iowa 1974); In re Interest of J.D.G., 498 S.W.2d 786 (Mo. 1973); State v. Elmore, 24 Or. App. 651, 546 P.2d 1117 (1976); and Flores v. State, 69 Wis. 2d 509, 230 N.W.2d 637 (1975).

The holding of the Court of Appeals runs directly counter to that of the New Hampshire Supreme Court. It is also in conflict with the decisions of all state courts which have considered the question. It is a significant issue, and a significant conflict. It is a question of law which has not been, but should be, settled by this Court.



## CONCLUSION

For the reasons stated above, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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January 25, 1978

APPENDIX A

# United States Court of Appeals
## For the First Circuit

No. 77-1197

THOMAS E. MELOON,
PETITIONER, APPELLEE,
*v.*
RAYMOND A. HELGEMOE, WARDEN,
NEW HAMPSHIRE STATE PRISON, et al.,
RESPONDENTS, APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE
[Hon. HUGH H. BOWNES, *U.S. District Judge*]

Before COFFIN, *Chief Judge*,
TUTTLE,* *Circuit Judge*,
WOLLENBERG,** *District Judge*.

*Peter W. Heed*, Attorney, with whom *David H. Souter*, Attorney General, was on brief, for appellants.
*Eleanor Krasnow*, by appointment of the Court, for appellee.

October 31, 1977

COFFIN, *Chief Judge*. Appellee, Thomas E. Meloon, was indicted and convicted under New Hampshire RSA 632:1-c in 1974 for the crime of "statutory rape". Meloon unsuccessfully appealed his conviction to the New Hampshire Supreme Court arguing among other issues that the New Hampshire statute violated the Fourteenth Amendment.[1] *State* v. *Meloon*, 116 N.H. —, 366 A.2d 1176

* Of the Fifth Circuit, sitting by designation.
** Of the Northern District of California, sitting by designation.
[1] The New Hampshire Supreme Court concluded that the classification in the statute was "reasonable and not constitutionally suspect". It is unclear what standard it used in making that evaluation. In explaining this conclusion the court simply stated that "The potential pregnancy of the female and the remote contingency of the older female seducing the under-age male with harmful results justify the legislative restriction of the crime to the male sex." *State* v. *Meloon*, 116 N.H. —, 366 A.2d 1176, 1177 (1976).



(1976). In 1977 appellee filed a petition for a writ of habeas corpus with the United States District Court for the District of New Hampshire. The district court at first denied appellee's petition, but later reconsidered and granted the writ on the grounds that the statute under which appellee had been convicted violated the Equal Protection Clause. The state of New Hampshire appeals.

This case presents us with an unusual legal situation. New Hampshire has promulgated a gender based criminal law which makes it a felony for a male to have sexual intercourse with a consenting female under the age of 15, while it is not a crime of any kind for a woman to have normal sexual intercourse with a male under the age of 15.[2] All of the other New Hampshire laws regulating sexual behavior which were brought to the attention of this court, as they pertain to the conduct of consenting parties, are gender neutral and apply equally to men and women. Appellee states that RSA 632:1-c discriminates against males; there can be little question that it does so since only male perpetrators of the offense are punished and only female victims of the crime are protected. We must decide whether such a discriminating classification violates the Fourteenth Amendment. We conclude that it does and affirm the decision of the district court.

It has long been recognized that a state has vast discretion in developing classifications and categories in the exercise of its police power. Legislatures may decide that certain groups of individuals will suffer particular penalties

[2] Unless otherwise specified, all references to New Hampshire law throughout this opinion refer to the statutes in effect at the time of appellee's conviction.

and others will not. As the Supreme Court indicated in upholding a law permitting the commitment of a "psychopathic personality",

> "The question, however, is whether the legislature could constitutionally make a class of the group it did select. That is, whether there is any rational basis for such a selection. We see no reason for doubt upon this point. Whether the legislature could have gone farther is not the question. The class it did select is identified by the state court in terms which clearly show that the persons within that class constitute a dangerous element in the community which the legislature in its discretion could put under appropriate control. As we have often said, the legislature is free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be clearest. If the law 'presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied.' *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79; *Miller* v. *Wilson*, 236 U.S. 373, 384; *Semler* v. *Dental Examiners*, 294 U.S. 608, 610, 611; *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379, 400." *Minnesota* v. *Probate Court*, 309 U.S. 270, 274-75 (1939).

*See also Patsone* v. *Pennsylvania*, 232 U.S. 138, 144 (1914); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1955).

The rational basis test described above is not appropriate for the constitutional evaluation of all criminal classification systems. Legislation which involves certain fundamental rights invites strict scrutiny, *Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1941). Racial or "suspect" classification also require a compelling state interest to meet equal protection standards. Indeed, the Supreme Court has admonished that "with a racial classification embodied in a criminal statute ... where the power of the State



weighs most heavily upon the individual or the group, we must be especially sensitive to the policies of the equal protection clause . . . ", *McLaughlin* v. *Florida*, 379 U.S. 184 192 (1964).

The statute at issue in this case is a classification based on sex. As such it requires more heightened scrutiny than would be applied to completely non-suspect legislation, but less stringent scrutiny than is typically applied to racial classifications, *Reed* v. *Reed*, 404 U.S. 71 (1971); *Frontiero* v. *Richardson*, 411 U.S. 677 (1973). Moreover, since a criminal statute is involved, the standards governing gender classification must be applied with special sensitivity. In *Craig* v. *Boren*, 429 U.S. 190 (1976), the majority opinion evaluated a gender based state law with criminal implications under the rule that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Id.* at 197. This is hardly a precise standard. Moreover, separate concurrences by Justice Powell and Justice Stevens make it unclear as to whether that standard has majority support. In brief we must decide the constitutionality of the New Hampshire statute under a test that to some indeterminate extent requires more of a connection between classification and governmental objective than that of the minimal rationality standard.[3] We do not believe the statute

[3] It is clear after the decision in *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), that although four members of the Court favor including sex as a suspect classification, the majority does not accept such a doctrine. The resulting ambiguity as to the proper standard to apply to gender classifications was frankly discussed by Justice Powell in his concurrence in *Craig* v. *Boren*, 429 U.S. 190, 210 n.*, "As is evident from our opinions, the Court has had difficulty in agreeing upon a standard of equal protection analysis that can be applied consistently to the wide variety of legislative classifications. There are valid reasons for dissatisfaction with the 'two-tier' approach that has been prominent in the Court's decisions in the past decade. Although viewed by many as a result-oriented substitute for more critical analysis, that

before us can withstand any such "fair and substantial relation" test. *Reed* v. *Reed, supra,* 404 U.S. at 71.

New Hampshire suggests four "reasons" for its classification scheme: (1) part of the class of males under the age of 15, pre-pubescent males, are physiologically incapable of becoming victims of this consensual offense; therefore the class of victims vulnerable to women offenders is smaller than the class of victims vulnerable to male offenders; (2) adult males, due to a psychological disorder known as pedophilia or otherwise, are more likely to seek to commit the offense than adult women; therefore the class of potential male offenders is larger than the class of potential women offenders; (3) female children are more likely to suffer physical damage during the commission of the offense than are male children; thus the class of female victims is in danger of more severe injury than their male counterparts; (4) only female victims may become pregnant; thus again the class of female victims may suffer more severe repercussions from the offense than will their male counterparts.[4]

approach—with its narrowly limited 'upper-tier'—now has substantial precedential support. As has been true of *Reed* and its progeny, our decision today will be viewed by some as a 'middle-tier' approach. While I would not endorse that characterization and would not welcome a further subdividing of equal protection analysis, candor compels the recognition that the relatively deferential 'rational basis' standard of review normally applied takes on a sharper focus when we address a gender-based classification. So much is clear from our recent cases."

[4] The state contends that there is overwhelming support for the constitutionality of statutory rape laws and cites twelve cases to establish that proposition. We do not find the authority of these cases so persuasive that they require us to reverse the judgment of the district court. While mindful of these decisions, we believe they are sufficiently distinguishable to put us to the task of independently analyzing the particular statute before us under the current doctrine of the Supreme Court.

Five of the cases New Hampshire cites, *Brooks* v. *Maryland,* 24 Md. App. 334, 330 A.2d 670 (1975); *State* v. *Price,* 215 Kan. 718, 529 P.2d 85 (1974); *People* v. *Gould,* 532 P.2d 953 (Colo. 1975); *Finley* v. *State,* 527 S.W.2d 553 (Texas Crim. App. 1975);



The state also noted in its brief that the general object of the legislation was "the protection of children from exploitation through the act of sexual intercourse." What the state has failed to indicate, however, is how these "reasons" connect the statutory classification to its specified objective. Before examining any of these justifications on the merits we must probe further to determine exactly what the state is trying to tell us as to why its law withstands constitutional scrutiny. Why, we must ask, does the difference in sex between persons who have sexual intercourse with persons under 15 "warrant the distinction" in penalties imposed by state law. *See Stanton* v. *Stanton,* 421 U.S. 7, 14 (1975).

and *People* v. *Medrano,* 24 Ill. App.3d 429, 321 N.E.2d 97 (1974), are exclusively concerned with acts of forcible rape and are inapposite to the present case. We emphasize, as did the district court below, that our analysis is predicated on the consensual nature of the crime committed by appellee.

Three other cases, although involving convictions under statutory rape laws, are distinguishable from the present case in that the offensive conduct included the use of force. It is not unlikely that a court's reasoning on this issue would be colored by the fact that an actual rape had occurred as opposed to the statutory consensual offense. *See In re Interest of J.D.G.,* 498 S.W.2d 786, 793 (Missouri 1973). Moreover, in one of these cases the appellate court did not feel it was required to evaluate thoroughly the defendant's constitutional claim since he had failed to raise it at trial and it was not such an obvious and blatant constitutional violation that the trial court should have been expected to rule on it *sua sponte. In the Matter of W.E.P.,* 318 A.2d 286 (D.C. App. 1974). The third case, *State* v. *Drake,* 219 N.W.2d 492 (Iowa 1974), involved a statute which only punished the sexual act if performed by a male over the age of 25 with a woman under the age of 17. Not only does this age disparity significantly affect the purposes for which such a statute might be enacted but the high age of the potential female victim lends greater credence to a pregnancy prevention rationale.

Of the four remaining cases cited by the state, one, *Flores* v. *State,* 69 Wisc.2d 509, 230 N.W.2d 637 (1975), was specifically decided under the minimal rationality standard; its holding is therefore of limited relevance. Another, *People* v. *Green,* 183 Colo. 25, 514 P.2d 769 (1973), held that the statutory scheme challenged by defendant (which did involve a penalty for women

The state's first two "reasons" relate to the size of the victim and offender class. If one assumes that all else was equal, simply hinging the criminal sanction to the indeterminate differences in the size of these classes need not further the objective of protecting children from exploitation. Under a minimal rationality test the state's suggestion that there are more potential offenders in the class of males than the class of females would suffice. But under the stricter scrutiny required for classifications by gender, the state should be obliged to make some showing that by concentrating its enforcement resources on the gender class with more potential offenders and ignoring the rest of the population altogether, it is likely to achieve some greater measure of protection for its children than a gender neutral law would achieve. Similarly, the state should make some showing that by exclusively protecting a class disproportionately vulnerable to attack and offering no protection whatsoever to the other gender, it is maximizing its overall objective of protecting all children from exploitation by the means of sexual intercourse. The state has made no such showing. Indeed, its very premises are open to serious question.

having intercourse with under age males although a potentially lesser penalty than that which could be inflicted on comparable male offenders) was not a classification based solely on sex, but rather involved a variety of non-sexual factors. There is no question that the New Hampshire statute here involves a classification based solely on gender. *People* v. *Mackey*, 46 Cal. App.3d 756, 120 Cal. Rptr. 157 (1975) and *State* v. *Elmore*, 24 Ore. App. 651, 546 P.2d 1117 (1976), were both decided before the Supreme Court's decision in *Craig* v. *Boren*. *Elmore* recognized that gender classifications had been held to require some form of close scrutiny in the context of employment discrimination, but concluded that gender based criminal statutes should be evaluated under a lower level of scrutiny. We suggest, if there is any difference, the reverse is true *Mackey* devotes one sentence of analysis to the equal protection question before it and upholds the statutory rape law because "it would be unrealistic" to think that young girls are no more likely than young boys to attract adults on the prowl for sexual partners. We are not persuaded.



The state's contention as to the limited number of potential victims in the class of males under 15 is not only unsupported by any evidence but seems inconsistent with the face of the statute. Obviously pre-pubescent boys are incapable of achieving the degree of sexual penetration normally associated with adult intercourse. However, the New Hampshire statute specifically denotes that it applies to sexual contact involving "any penetration, however slight", New Hampshire RSA 623:II. There is no reason to believe that the degree of penetration necessary to achieve the statutory offense could not be successfully accomplished by pre-pubescent children. *See generally* Model Penal Code, §207.4, Comment (3) (Tent. Draft No. 4, 1956); *State* v. *Kidwell*, 27 Ariz. App. 466, 556 P.2d 20 (1976). As far as can be determined from the evidence before this court the number of potential victims in the class of males under 15 may include the great majority of the class members.

The state's second justification concerning the greater number of potential offenders in the class of males also raises difficult problems. Even if we assume arguendo that there is a group of males suffering from a mental disorder known as pedophilia and that the definitive symptom of that illness is an erotic attraction to children, this tells very little about the utility of the state's classification scheme. We are not told how prevalent the disease is in the normal male population, nor even what percentage of statutory offenders suffer from the malady. Moreover, the state gives us no indication whether there are any neurotic conditions which would influence adult women to seek out male sexual partners under the age of 15.[5]

[5] As for any normal proclivity of adults for sexual partners under the age of 15, the state presents no evidence or rationale for its assertion that such inclinations are disproportionately experienced by males.

In *Craig* v. *Boren, supra,* the Court rejected Oklahoma's contention that because ten times as many males in the 18-20 age group were arrested for drunken driving as were women in the same age group (2 percent of the men and .18 percent of the women), its gender based criminal statute withstood unconstitutional scrutiny. Here New Hampshire informs the court only that some unspecified percentage of an already small deviant class of potential statutory offenders suffers from a malady that is allegedly exclusively male. We cannot reconcile such a justification with the Court's decision in *Craig.*

New Hampshire's third and fourth reasons in support of its statutory scheme relate to its objectives in enacting a statutory rape law. Although its general objective is to prevent the sexual exploitation of children through the act of sexual intercourse, the state argues that within that overall goal it has particular concerns — the prevention of physical injury resulting from the act and the prevention of the pregnancy of the under age partner. Both these concerns, New Hampshire contends, are reasonably reflected by a gender based law.

We examine the pregnancy prevention rationale with special wariness. Certainly the fact that women and not men bear children is a fundamental distinguishing characteristic of the two sexes and as such it can be the basis for some gender based legislation; but there is a danger that the very uniqueness of this characteristic makes it an available hindsight catchall rationalization for laws that were promulgated with totally different purposes in mind. New Hampshire presents us with not an iota of testimony or evidence that the prevention of pregnancy was a purpose of its statutory rape law. Indeed, all the inferences that



may be drawn from the materials presented to us are to the contrary.[6]

New Hampshire points out that its statute was heavily influenced by the Model Penal Code, but the Code's statutory rape provision only protected female children under the age of ten for whom pregnancy could not have been a serious threat. Moreover, the state repeatedly refers to the long history of statutory rape legislation in Europe and the United States and the continuity of "the thrust of the crime". Yet the state admits that over the last 100 years the age which defines the defense has varied from ten to thirteen to sixteen to fifteen and finally back to thirteen. Without some concrete indication from the state as to the reasons behind these changes we cannot believe that such disregard for whether or not some or any of the class of females protected are of child bearing age is reconcilable with a pregnancy prevention rationale. We also note that New Hampshire's other laws governing sexual conduct seem inconsistent with the purposes asserted here. RSA 632:4 makes it a felony for any person (male or female) 17 years of age or older to have normal or deviant sexual intercourse with any person over 14 and less than 17 years of age. There is no question that the female victim class in this statute includes far more pregnable members than does the class of children under the age of 15. Yet in RSA 632:4 the state did not find it necessary

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[6] The district court below pointed out that "penetration, however slight, is all that is necessary for the crime and that emission is not required", and that the state "does not allow as a defense the use of contraceptives or birth control methods" in reaching its conclusion that the pregnancy prevention rationale could not withstand careful scrutiny. It is conceivable to us that a state could have intended to prevent any possible *risk* of pregnancy by prohibiting even sexual behavior that is unlikely to result in conception. However, we do not see how one could infer a pregnancy prevention rational from a statutory scheme that included the above conditions.

to use gender based legislation in order to prevent the pregnancy of its minors. Finally, we note that the current New Hampshire statutory rape law is gender neutral and sets the age limit at 13. This change from the 15 years of age limit in effect when appellee was convicted, made without any reference to its effect on the goal of preventing pregnancy, makes little sense if the prevention of pregnancy goal and the necessity for a gender based law to enforce it was of concern to the legislature.

The state's attorney is entitled to due deference in regard to his allegations as to his state's rationale for particular legislation, but that deference is not without limit. In *Califano* v. *Goldfarb*, 45 U.S.L.W. 4237, 4243 (Mar. 2, 1977), Justice Stevens noted in his concurrence, "a rule which effects an unequal distribution of economic benefits solely on the basis of sex is sufficiently questionable that 'due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve [the] interest' put forward by the government as its justification. *See Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 103." *See also Weinberger* v. *Weisenfeld*, 420 U.S. 636, 648 n. 16 (1975). Certainly in a criminal context we may view the government's rationale with at least as healthy a degree of skepticism. The pregnancy prevention rationale cannot withstand such scrutiny in this case.[7]

New Hampshire's final rationale is based on the potential for physical damage to young female children from intercourse which does not exist for their male counter-

[7] It is suggested that the prevention of pregnancy rationale is itself constitutionally unacceptable to the extent that it penalizes only the potential father for a consensual act the consequences of which, pregnancy, are clearly the responsibility of both parties. *See Commonwealth* v. *MacKenzie*, 334 N.E.2d 613 (Mass. 1975) (holding father but not mother criminally responsible for birth of illegitimate child violates equal protection). While there may be merit in such an analysis, we do not find it necessary to decide that issue.



parts. We do not understand New Hampshire to argue that this form of injury is the exclusive danger (pregnancy aside) which its statute is designed to mitigate. Nor do we understand it to allege that this form of injury is more severe or more prevalent than the psychic trauma usually associated with adult sexual contact with young children.[8] The contention is simply that there is one potential form of injury resulting from the offense to which only the class of females is susceptible. It is clear that the statute and its classification scheme cover a far larger class than this justification would warrant. There is little in the scenario of an adolescent love tryst of a 16 year old boy and a 14 year old girl (a clear violation of the statute) which invokes the likelihood of physical danger. Moreover, the state has given us no sense of how common an occurrence this form of injury is even for the adult-child scenario, particularly in light of the "penetration, however slight" definition of the offense. Given this lack of precision we are hard put to accept as "fair and substantial" the connection between (1) the fact that one sub-

[8] It is interesting to note that in its brief to the New Hampshire Supreme Court at the time Meloon appealed his conviction, New Hampshire emphasized the emotional and social aspects of the problem, making only one unexplained reference to physical exploitation. The state argued, "[S]ociety has a rational and even a compelling interest in protecting female children from physical, emotional and psychological exploitation by males. Special treatment of consensual intercourse with a female child is warranted not only because the emotionally immature require protection and to prevent the outrage of parental and community feelings, but also because an adult male's proclivity for sex relations with female children is a recognized symptom of mental aberration, called pedophilia . . . . Besides protecting those most vulnerable from the 'machinations of seducers', society has a rational interest in protecting social mores and institutions such as the family which are the mainstay of our social fabric. Ultimately, the simple fact that the female may become pregnant and the male cannot is reason enough to supply the required rational basis." Brief of the state of New Hampshire, p. 28, filed with the New Hampshire Supreme Court in case No. 7342.

class of one gender class of victims has some indeterminate likelihood of suffering an additional injury to which the other gender class is not susceptible and (2) the state's statutory scheme which penalizes only one gender exclusively and protects the other gender exclusively.

In conclusion we should compare our overall analysis with that of *Craig* v. *Boren, supra,* the most analogous Supreme Court case toward which we may turn for guidance. The present case involves a far more serious criminal penalty than did *Craig* and consequently a far greater legal differential between men and women (in fact, members of either sex could have been liable for criminal penalty under the Oklahoma statute in *Craig*). In *Craig* the unrestricted class, women in Oklahoma between 18 and 20 years of age, experienced a condoned freedom not available to men of the same age, the right to drink 3.2 percent beer. Presumably the state had some interest in not unnecessarily restricting the drinking habits of its citizenry. In the present case we do not understand New Hampshire to condone in any way the freedom of adult women to have intercourse with males under the age of 15 nor do we understand it to have any interest in maintaining the freedom of its women to do so. Finally, the Oklahoma statutory scheme in *Craig* did not have the mirror image effect we have here, that by only penalizing one gender of offenders, males, for committing a heterosexual offense, the state necessarily leaves the potential victims of that offense of the same gender, young males, without protection. Given these circumstances and the holding in *Craig,* we must hold New Hampshire's law up to at least comparable scrutiny. That scrutiny at a minimum requires that the actual and constitutionally acceptable objectives of New Hampshire's law be substantially furthered in fact and reason by the divergent treatment that law extends to the different sexes. New Hampshire's statutory rape law does not do so.



We want to take care to indicate the limited nature of our holding. We have found only one particular statutory rape law to be unconstitutional. We have not reflected on nor do we intend to question the constitutionality of the laws of other states. We express no opinion as to whether on a different record some other statute would pass constitutional scrutiny.

*Affirmed.*

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## APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

| | | |
|---|---|---|
| Thomas E. Meloon | ) | |
| | ) | |
| *v.* | ) | Civil Action No. 77-11 |
| | ) | |
| Raymond A. Helgemoe, Warden, New Hampshire State Prison, and David H. Souter, Attorney General of the State of New Hampshire | ) | |

### *OPINION*

This petition for writ of habeas corpus attacks the constitutionality of NH RSA 632:1 I (c)(1971) (superseded by NH RSA 632-A:3 (1975)), pursuant to which petitioner was convicted of having sexual intercourse with a female not his wife and under fifteen years of age.

> A male who has sexual intercourse with a female not his wife is guilty of a class A felony if
>
> * * *
>
> (c) the female is unconscious or less than fifteen years old; . . .

Two constitutional challenges have been mounted:

1. that he was denied equal protection of the laws because the statute discriminates against males; and

2. that the statute on its face and as applied to him deprived him of the substantive right to due process of law



guaranteed under the Fourteenth Amendment.

At the outset, I note that this case does not involve forceable rape.

Petitioner's primary constitutional claim is that the statute, on its face and as applied to him, denies him equal protection of the laws because it is directed only at males who have intercourse with females of the age of fifteen or under and, therefore, discriminates against such males. The New Hampshire Supreme Court noted that this "novel" theory had been universally rejected whenever it was advanced. While it is true that the petitioner can point to no cases striking down statutory rape laws, the New Hampshire statute enacted in 1975, which does not differentiate between males and females, is clear proof that this theory is not "novel."

> A *person* is guilty of a class B felony . . . if he engages in sexual penetration with a *person* who is thirteen years of age or older and under sixteen years of age. NH RSA 632-A:3. (Emphasis added.)

This statute has been enacted into law in this and other states that have updated the Model Penal Code which was the basis for the 1973 law under which petitioner was convicted.

In an equal protection analysis, the first inquiry to be made is whether there is, in fact, any discrimination or unequal treatment of the sexes. In *Geduldig v. Aiello*, 417 U.S. 484, 496-497 (1974), the United States Supreme Court said there is no discrimination where

> [t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.

*See also General Electric Co. v. Gilbert*, 45 U.S.L.W. 4031 (U.S. 12/7/76).

There can be little doubt that, under the New Hampshire Rape Statute in effect at the time, women and men were treated disparately. It was a crime for a male of any age to have sexual intercourse with a female not his wife who was less than fifteen years old. A fourteen year old boy could have been found guilty of a class A felony if he had sexual intercourse with a fourteen year old girl. A woman of twenty-four years of age who seduced a boy of fourteen would not have been guilty of a crime.[1] Only the male faced the risk of criminal prosecution for engaging in sexual intercourse with a minor.

The next step is to determine against what standard the statute is to be measured. There have been two traditional tests to which constitutionally challenged statutes have been subjected; strict scrutiny and rational basis. The strict scrutiny test is applied to statutes that discriminate on the basis of race, alienage or nationality. *See, e.g., Loving v. Virginia,* 388 U.S. 1 (1967), *Graham v. Richardson,* 403 U.S. 365 (1971), *Oyama v. California,* 332 U.S. 633 (1948), and is also used where the interests involved are fundamental. *Dunn v. Blumstein,* 405 U.S. 330 (1972); *Stanley v. Illinois,* 405 U.S. 645 (1972); *Skinner v. Oklahoma,* 316 U.S. 535 (1942). To pass constitutional muster under the strict scrutiny test, the statute must be necessary to accomplish some legitimate state objective by the least restrictive means possible.

The rational basis test means that the state retains broad discretion as long as there is a reasonable basis for the classification.

> Under the traditional due process and equal protection standard we do not determine whether a statute is wise, or whether it is necessary, but only whether it is rationally related to a legitimate governmental objective. *Tiews v. School District,* 111 N.H. 14, 20 (1971).

[1] Under the statute now in effect, such a female would be guilty of a class B felony. NH RSA 632-A:3.



This is the standard that the New Hampshire Supreme Court applied to the statute in issue.

With the recent proliferation of gender based cases, a new test, standing somewhere between strict scrutiny and rational basis, has begun to emerge.

In *Reed v. Reed,* 404 U.S. 71 (1971), the Court, in striking down a state probate statute that gave males a preferred position as executors, stated:

> A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Id.* at 76. (Citation omitted.)

In *Frontiero v. Richardson,* 411 U.S. 677 (1973), a plurality of the Court found that sex was a suspect classification and, therefore, subject to strict scrutiny. It noted, after quoting from *Bradwell v. State,* 16 Wall. 130, 141 (1873), that:

> "The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator."
>
> As a result of notions such as these, our statute books gradually became laden with gross, stereotyped distinctions between the sexes and, indeed, throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children. *Frontiero* at 685. (Brennan, J.)

In a separate concurrence, the Chief Justice and Justices Powell and Blackman refused to accept the strict scrutiny standard.

> It is unnecessary for the Court in this case to characterize sex as a suspect classification, with all of the far-reaching implications of such a holding. *Id.* at 691-692.

Since then, the cases have wavered back and forth between the two tests with the Court often scrutinizing the statutory scheme under the guise of the rational basis test. *See, e.g., Kahn v. Shevin,* 416 U.S. 351 (1974) (property tax exemption for widows upheld as rationally based due to the disparate economic opportunities afforded men and women); *Schlesinger v. Ballard,* 419 U.S. 498 (1975) (gender based differentiation in the Navy's mandatory discharge regulations rationally related to the laudatory purpose of equalizing promotional opportunities between men and women); *Weinberger v. Wiesenfeld,* 420 U.S. 636 (1975) (granting of Social Security survivors' benefits to widows but not to widowers irrational and based on archaic notions of sex roles); *Stanton v. Stanton,* 421 U.S. 7 (1975) (gender based distinctions as to age of minority for purposes of child support not rational).

*Craig v. Boren,* 45 U.S.L.W. 4057 (U.S. 12/20/76), is the only Supreme Court gender based discrimination case concerning a criminal statute. After examining statistical evidence, the Court struck down a criminal statute which differentiated in the age at which beer could be sold to males (21) and females (18). It found the relationship between gender and the asserted justification for the statutory scheme far too tenuous to withstand the substantial justification test laid out in *Reed.* In the most recent gender based discrimination case involving a section of the Social Security Act, the Court stated:

> [It] is forbidden by the Constitution, at least when supported by no more substantial justification than "archaic and overbroad" generalizations, *Schlesinger v. Ballard supra,* 419 U.S., at 508, or "old notions," *Stanton v. Stanton,* 421 U.S. 7, 14 (1975), such as "assumptions as to dependency," *Weinberger v. Wiesenfeld, supra,* at 645, that are more consistent with "the role-typing society has



> long imposed," *Stanton v. Stanton, supra,* at 15, than with contemporary reality. *Califano v. Goldfarb,* 45 U.S.L.W. 4237, 4239 (U.S. 3/2/77).

Mr. Justice Powell's concurring opinion in *Craig* perceptively sums up the direction the law is taking.

> As is evident from our opinions, the Court has had difficulty in agreeing upon a standard of equal protection analysis that can be applied consistently to the wide variety of legislative classifications. There are valid reasons for dissatisfaction with the "two-tier" approach that has been prominent in the Court's decisions in the past decade. Although viewed by many as a result-oriented substitute for more critical analysis, that approach—with its narrowly limited "upper-tier"—now has substantial precedential support. As has been true of *Reed* and its progeny, our decision today will be viewed by some as a "middle-tier" approach. While I would not endorse that characterization and would not welcome a further subdividing of equal protection analysis, candor compels the recognition that the relatively deferential "rational basis" standard of review normally applied takes on a sharper focus when we address a gender-based classification. So much is clear from our recent cases. *Craig, supra,* at 4063.

With these guidelines in mind, I now address the statute under which the petitioner was convicted. Two basic reasons are advanced for holding the classification reasonable and not constitutionally suspect:

1. The potential for pregnancy of the female, and

2. The "remote" contingency that an underage male will suffer harmful results from being seduced by an older female.

While the pregnancy reason does have a surface rationality, it does not withstand careful scrutiny. The statute is not directed towards the prevention of pregnancy. In fact, it specifically states that penetration, however slight, is all that is necessary for the crime and that emission is not required. It does not differentiate between a female capable of bearing a child and one who has not yet reached puberty. It does not allow as a defense the use of contraceptives or birth control methods. Moreover, there is no valid reason for

singling out the male for criminal treatment where the act is consensual. The Supreme Judicial Court of Massachusetts recently struck down a criminal statute that made a male guilty of a misdemeanor for fathering a child. The Massachusetts Court noted:

> [W]e discern no permissible legislative goal which rationally is achieved by making a father, but not a mother, guilty of conceiving a child out of wedlock . . . The imposition of a criminal sentence on the father alone for begetting the child violates the equal protection of the laws. *Commonwealth v. MacKenzie*, 334 N.E. 2d 613, 615 (1975).

The second reason advanced is the real basis for the distinction made between males and females.[2] It is predicated on the assumption that the female, particularly a young female, will be harmed by having sexual relations with an older and mature male, but that such harm is unlikely to occur in the reverse situation. This assumption is grounded not on any competent facts or evidence, but rather on societal sexual standards that are rooted in our male oriented background and values. It would be glib to call this attitude a holdover from the Victorian Era because this overlooks our Puritan background and the moral values and standards that are accepted in our society. It is only very recently that we

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[2] I am aware that the Supreme Court dismissed for want of substantial federal question an appeal from a Texas case which upheld against an equal protection attack an aggravated assault conviction of an adult male. *Buchanan v. State*, 480 S.W. 2d 207 (Tex. Cr. App. 1972), appeal dismissed, 409 U.S. 814 (1972). The Texas statute made an assault by a male on a female an aggravated assault while an assault by a female on a female constituted only a simple assault. The court held that, because the purpose of the statute was to protect against serious bodily injury and because females "as a general rule, are of smaller physical stature and strength than are men," *id.* at 209, the classification was rationally related to the objective of the statute as a whole. I find the Texas case distinguishable from the instant case, and, therefore, conclude that it is not of binding precedential value under *Hicks v. Miranda*, 422 U.S. 332 (1975). The statutes in question are not "sufficiently the same" for *Buchanan* to be controlling precedent, *Hicks* at 345 n.14, and it is clear that, since 1972, "doctrinal developments indicate" that the equal protection question may now be more substantial. *Hicks* at 344. *See Usery v. Turner Elkhorn Mining Co.*, 44 U.S.L.W. 5181 (U.S. 7/1/76); *Edelman v. Jordan*, 415 U.S. 651, 671 (1974).



have come to realize that the sexual differences between male and female are not constitutionally valid reasons for setting up different standards of behavior and different laws for men and women. The 1975 statute is, of course, a prime example of the new approach. It makes no distinction between the sexes.

I rule that Section 1 of NH RSA 632 was unconstitutional on its face and when applied to petitioner because it singled out males for disparate treatment under the law as opposed to females and it did not meet the constitutional test required of a sex based statute since it had no "fair and substantial relation to the object of the legislation." *Reed, supra*, 404 U.S. at 76.

This ruling makes it unnecessary to consider the due process claim.

IT IS ORDERED that the Writ of Habeas Corpus issue and that the petitioner be released.

Execution of this order is stayed pending a decision as to appeal by the State of New Hampshire.

/s/Hugh H. Bownes
United States District Judge

April 21, 1977

cc: Attorney General
Eleanor Krasnow, Esq.

## APPENDIX C

Rockingham SS.
No. 7342

State of New Hampshire

*v.*

Thomas E. Meloon

November 30, 1976

*David H. Souter,* attorney general, and *Peter W. Heed,* attorney (*Mr. Heed* orally), for the State.

*Eleanor Krasnow*, by brief and orally, for the defendant.

GRIFFITH, J. Defendant was found guilty after a trial by jury of an indictment alleging violation of then-effective RSA 632:1 (c), in that on November 10, 1973, he had sexual intercourse with a female, not his wife and under fifteen years of age. The Trial Court, *Cann,* J., sentenced defendant to not less than seven nor more than fifteen years in State prison. This sentence was reduced by the Sentence Review Board to a term of five to ten years on April 16, 1976. All questions of law arising from the trial were reserved and transferred by *Cann,* J.

The defendant is represented on appeal by new counsel who did not participate in the trial. We are now urged to consider whether the trial court's instructions to the jury were in error because they did not state that the prosecution was required to prove that the defendant knew that the prosecutrix was under the age of fifteen at the time he committed the act in question. Defendant further asks us to decide whether RSA 632:1 (c) (repealed Laws 1975, 302:2), under which he was convicted, violated his constitutional rights of equal protection and due process of law.



Trial counsel made no objections and took no exceptions during the trial and at the conclusion of the trial court's charge to the jury stated he had "[n]o objections to the charge." By failing to object at a time when the instructions, if improper, could have been corrected by the court, he has waived any right to have the question considered now. *State v. Breest,* 115 N.H. 504, 345 A. 2d 391 (1975); *State v. O'Brien,* 114 N.H. 233, 317 A. 2d 783 (1974). We find no reason in this case to waive the usual rule that exceptions not properly taken are waived. *See Barton v. Manchester,* 110 N.H. 494, 272 A. 2d 612 (1970); *cf. State v. Nelson*, 105 N.H. 184, 196 A. 2d 52 (1963).

The trial court's charge that the State need not prove that the defendant knew the prosecutrix was under fifteen years of age was in accord with the statute and *State v. Gerald Davis*, 108 N.H. 158, 229 A. 2d 842 (1967). Even were the issue properly before us, there is no incentive to reexamine the *Davis* rule where the record is replete with uncontradicted evidence, including the defendant's own admission, that he did in fact know that the prosecutrix was under the age of fifteen at the time he committed the act in question.

The defendant also proposes here that we find RSA 632:1 (c) on its face and as applied to him denies him equal protection of law as guaranteed by the fourteenth amendment to the United States Constitution. Defendant argues that because the statute under which he was convicted is directed only at males who rape females and not at females who rape males, unlike the present provision RSA 632-A:2 (Supp. 1975), that there is an invidious discrimination against males. Defendant cites no authority in support of his novel theory and we note that wherever we have found it advanced, it has been universally rejected. *See, e.g., People v. Mackey,* 46 Cal. App. 3d 755, 120 Cal. Rptr. 157 (1975); *People v. Green,* 183 Colo. 25, 514 P. 2d 769 (1973); *In re W.E.P.*, 318 A. 2d 286 (D.C. App. 1974); *State v. Drake,* 219 N.W. 2d 492 (Iowa 1974); *In re Interest of J.D. G.*, 498 S.W. 2d 786 (1973); *State v. Elmore,* 24 Or. App. 651, 546 P. 2d 1117 (1976); *Finley v. State,* 527 S.W. 2d 553 (Tex. Crim. App.

1975); *Flores v. State,* 69 Wis. 2d 509, 230 N.W. 2d 637 (1975).

We agree with the reasons advanced in the above cases that establish the classification as reasonable and not constitutionally suspect. The potential pregnancy of the female and the remote contingency of the older female seducing the under-age male with harmful results justify the legislative restriction of the crime to the male sex.

Appeal dismissed.

GRIMES, J., concurred in the result; the others concurred.